PP

v.

ALLY AZRAN HOLDING SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
AZMAN ABDULLAH JC
[CRIMINAL APPEAL NO: 41-126-2005]
15 JULY 2009

CRIMINAL PROCEDURE: *Appeal - Appeal against acquittal - Evidence - Issue overlooked by magistrate - Serious gap in prosecution's case - Whether prima facie case proven against respondent*

LABOUR LAW: *Employment - Definition of wages - Whether includes commission - Employees Provident Fund Act 1951, s. 2*

LABOUR LAW: *Provident Fund - Failure to contribute - Whether respondent was employer - Whether Edaran Otomobil Nasional (EON) Sdn Bhd had caused respondent to default in payment of contribution*

The respondent dealt in selling cars and in 1989, acquired a right to a Proton Saga car dealership through an agreement with Edaran Otomobil Nasional (EON) Sdn. Bhd. Complaints were made against the respondent by an officer of the Employees Provident Fund Board ("the Board") and a summons was filed in the magistrate's court that the respondent as an employer had failed to pay to the Board a monthly contribution in respect of one of its employees, Chen Ah Fong ("SP1") for the months of February and March 1990. SP1 testified at the trial that he earned a monthly basic salary of RM250 and would be given a commission of RM380 for each car sold payable at the end of every month. After leaving the respondent, SP1 worked with another company dealing in national car dealership named Ally Azwin Sdn. Bhd. which he said belonged to the "same owner" as his previous company, but in a cross-examination stated they were the "same company". An officer from EON (SP4) testified at the trial that EON had issued a letter dated 28 August 2001 to all its dealers (exh. P6) to ensure that the dealers have to pay all their EPF to their salesmen. In the course of the trial the learned magistrate admitted exh. D3 being a letter from EON dated 1 December 1988 to the respondent "to appoint Ally Azran as EON vehicle sales dealers. Commencement on 2 January 1989"; and exh. D4 being a "Vehicle Sales Dealer Agreement" dated 1 March 1991 between EON and Ally Azwin

A Sdn. Bhd. At the end of the prosecution's case, the learned magistrate acquitted the respondent without calling for its defence. The prosecution appealed to the High Court.

Held (dismissing the appeal and confirming the order of
B **acquittal by the magistrate):**

(1) The commission received by SP1 was a "remuneration due to an employee under his contract of service where payment was calculated in relation to a set task or tasks, in respect of the number of tasks completed by the employee" as prescribed
C under limb (b) of the definition under s. 2 of the Employees Provident Fund Act 1951 ('1951 Act'). Hence 'the commission' was part of wages under the 1951 Act and the respondent was obliged under the 1951 Act to pay monthly contributions to the Board, not only in respect of SP1's basic salary but also in
D respect of the commission received by him. *Peter Anthony Pereira & Anor v. Hotel Jayapuri Bhd & Anor* (foll). (paras 10-20)

(2) Based on the evidence as a whole, the respondent in this case was the employer of SP1 as far as the EPF contribution for the
E months of February and March 1990 were concerned, not Ally Azwin. (paras 21-24)

(3) The amount of commission to be received by a sales representative such as SP1 was first determined by EON and
F the payment was then made by EON to the dealers after deducting the EPF contribution and then for the dealers to pay the commission to the sales representative. Thus, the burden was on the prosecution to prove during its case that, if indeed it was the dealer who is liable to pay for the contribution to
G the Board under the agreement between EON and the dealers as stated by SP4 and as shown by exh. P6, that such deduction had been remitted back by EON to the dealer and indeed had reached the dealer before it could be assumed that the dealer is then responsible to make sure that the contribution reached the
H Board. There was a serious gap in the prosecution's case as the evidence was lacking here and the prosecution had failed under the maximum evaluation test, to prove a *prima facie* case against the respondent in this case. (paras 25-32)

I **Case(s) referred to:**
Peter Anthony Pereira & Anor v. Hotel Jayapuri Bhd & Anor [1987] 1 CLJ 14; [1987] CLJ (Rep) 12 PC ***(foll)***

Legislation referred to:
Employees Provident Fund Act 1991, ss. 43(2), 45
Employees Provident Fund Act 1951, ss. 2, 7(1), 16A(1)(c)
Employees Provident Fund (Amendment) Act 2000, s. 2

For the appellant - Husmin Hussin DPP
For the respondent - Mohd Nazim Ibrahim; M/s Azwan & Nazim

Reported by Susheila Sreedharan

JUDGMENT

Azman Abdullah JC:

Backgrounds Of Case

[1] The respondent in this case was a company dealing in selling of cars which, in 1989, had acquired a right to a Proton Saga car dealership through an agreement with Edaran Otomobil Nasional (EON) Sdn. Bhd., which at that time was a sole distributor of the national car. By summons dated 13 September 2001 issued by a magistrate's court in Kuala Lumpur, the company was summoned to appear before a magistrate on 7 November 2001 to answer to two counts of charges for offences under s. 43(2) of the Employees Provident Fund Act 1991 (Act 452). The summons was issued based on the complaints (at p. 7 of the record of appeal) made against the company by an officer of the Employees Provident Fund Board ("the Board") and filed in a magistrate's court, containing statements to the effect that the respondent company as an employer had failed to pay to the Board a monthly contribution in respect of one of its employee by the name of Chen Ah Fong for the months of February and March 1990, a statutory requirement under s. 43 and 45 of the Employees Provident Fund Act 1991, thus committing an offence punishable under s. 43(2) of the same Act.

[2] The notes of the proceedings in the magistrate's court (at p. 11-55 of the record of appeal) show that a trial proper started on 17 August 2004 when the witnesses started to testify. On that date, an amended charge was tendered to the court by the prosecution, substituting a charge under s. 43(2) of the Employees Provident Fund Act 1991 with a new charge under s. 16A(1)(c) of the Employees Provident Fund Act 1951 (Revised 1982) (Act 272) apparently on the ground that when the alleged offences were committed in 1990, the Employees Provident Fund Act 1991 was yet to be in existence, in fact it only came into force on 1 June 1991.

[3] Section 7(1) of the 1951 Act provides that every employee and employer shall be liable to pay monthly contributions at the rate respectively set out in the Third Schedule of the Act, and under s. 16A(1)(c) of the Act, any employer who fails within such period as may be prescribed to pay to the Fund any amount which he is liable under this Act to pay in respect or on behalf of any employee in respect of any month, shall, on conviction, be liable to a fine not exceeding two thousand ringgit or to imprisonment for a term not exceeding six months or to both.

Brief Facts Of Case

[4] In a trial before the magistrate, the prosecution had called four witnesses ie, the said employee Chen Ah Fong ("SP1"), the investigating officer ("SP2"), and two officers from EON Berhad, formerly known as EON Sdn. Bhd. ("SP3 and SP4"). According to SP1, he started working with the respondent company from 2 January 1989 until he left the company in December 1990, earning a monthly basic salary of RM250 and he would be given a commission of RM380 for each car sold payable at the end of every month. When asked during the trial as to why he left the respondent company, he said that it was because he "was not given a car to sell. Because they don't have enough car for the buyers. At that time, the car hot in the market". SP1 said that the RM250 salary was paid by cash at the end of the month, but the commission was paid by cheque. After leaving the respondent company, SP1 worked with another company dealing in national car dealership company by the name of Ally Azwin Sdn. Bhd. which according to him belonged to the "same owner" as his previous company, but in a cross-examination said that they are the "same company".

[5] The evidence of SP2 shows that the investigation against the respondent company began in February 2001 after the Board received a complaint from one of its workers, apparently SP1. In a course of his investigation, he had met twice with an officer of the respondent company by the name of En. Abdul Hadi Lokman who was an account executive at the company and he also called the complainant. After the meetings with En. Abdul Hadi, SP2 had prepared an assessment on the amount of contribution that the company supposedly required to pay to the Board in respect of the salary and commission received by SP1 (see exhs. P7, P8 and P9 at pp. 164-173 of the record of appeal). The assessment by SP2 was based on records obtained from both the employer and employee

that include exhs. P4 and P5. In cross-examination, it transpired that when SP2 undertook his investigation, there had been previous prosecution against Ally Azwin Sdn. Bhd. regarding the same matter whereby the prosecution had applied for the company (Ally Azwin) to be discharged not amounting to an acquittal (DNAA) due to some confusion on the identity of the company involved.

[6] As regards to the evidence of SP3 and SP4, they mainly concern with a content of one letter dated 28 August 2001 issued by EON to all its dealers (see exh. P6 at p. 163 of the record of appeal). Regarding the said letter, SP4 gave the following evidence:

> P6 is a letter signed by me concerning EPF payment on sales commission, directed to all dealers. This document issued by me on behalf of EON. I'm the one who signed the document. At that time I was director cum sales director. This document directed to all dealers. The main purpose is to ensure that the dealers have to pay all their EPF to their salesman. Referring to paragraph 1 line 3 and paragraph 3 line 2, we are reminding the dealers that they are liable to pay EPF to salesman and if the dealers not comply with, they are in breach of the laws of the country. This P6 issued on August 23, 1991. Prior to that date, dealers are responsible to the EPF payment.

[7] In the course of his cross-examination of SP4, the counsel for the respondent had managed to convince the learned trial magistrate to admit two documents. One is a letter signed by SP4 on behalf of EON dated 1 December 1988 issued to the respondent company (see exh. D3 at p. 104 of the record of appeal) which "intention" according to SP4 was "to appoint Ally Azran as EON vehicle sales dealers. Commencement on 2 January 1989". Another is "Vehicle Sales Dealer Agreement" dated 1 March 1991 between EON and Ally Azwin Sdn. Bhd. which was also signed by SP4 (see exh. D4 at p. 122-146 of the record of appeal).

[8] At the end of the prosecution case, the learned trial magistrate acquitted the respondent without calling for its defence, hence the appeal to the high court.

The Issues Before The Court

[9] The prosecution in its petition of appeal (at p. 2-4 of the record of appeal) had laid down 13 grounds on why it dissatisfied with the decision of the learned trial magistrate. In the hearing of the appeal before this court, the learned DPP in his submissions had focused on the following two issues:

A (i) Whether a definition of 'wages' under s. 2 of the 1951 Act includes 'a commission'.

(ii) Whether the respondent in this appeal was the employer of "SP1" or was it another company by the name of Ally Azwin
B Sdn. Bhd.

Whether A Definition Of 'Wages' Under s. 2 Of The 1951 Act Includes 'A Commission'

[10] The learned trial magistrate in her ground of judgment
C answered the above question in the negative, apparently upon making a comparison between a definition of "wages" in the 1951 Act and the Employees Provident Fund (Amendment) Act 2000 (Act A1080) and having found that contrary to the 2000 Act, the word "commission" does not appear under the 1951 Act. Thus, it
D was her reasoning that the definition of wages under the 2000 Act was amended to include 'a commission' with a view to rectify the flaw under the 1951 Act as well as the succeeding 1991 Act that excludes a word 'commission' in its definition of wages. The learned trial magistrate in her grounds stated as follows:

E

> Tambahan pula peruntukan undang-undang tidak menyebut secara jelas tentang 'KOMISEN' didalam interpretasi "wages" dalam akta tersebut. Jadi dengan ketiadaan perkataan "komisen" dalam takrif "gaji" bermakna ia tidak tergolong dalam takrifan tersebut. Kelompangan ini dapat dilihat dan telah diperbetulkan dengan akta
F pindaan tahun 2000 yang telah dimasukkan perkataan "komisen" selepas perkataan "bonus". (Rujuk Akta Kumpulan Wang Simpanan Pekerja (Pindaan) 2000).

[11] The learned DPP contended that the learned trial magistrate
G was wrong in interpreting the definition of wages under the 1951 Act by making a comparison with the definition of wages under the 1991 Act which was not in existence at the time when the alleged offences were committed.

H **[12]** Under the 1951 Act, a word "wages" is defined as:

> – the remuneration in money due to an employee under his contract of service or apprenticeship, whether agreed to be paid monthly, weekly, daily or otherwise –
>
> (a) in respect of the normal periods of work to be performed by
I the employee;

(b) where payment is calculated in relation to a set task or tasks, in respect of the number of tasks completed by the employee; or

(c) where payment is calculated in relation to the volume of work done, in respect of the work completed by the employee, together with any allowance payable by the employer to the employee in respect, either explicitly or impliedly, of high cost of living:

Provided that the wages of an employee in the service of the Government of Malaysia or of a State or of a statutory or local authority under the new scheme shall be the monthly salary inclusive of pensionable allowances payable in accordance with the salary scales of the new scheme.

[13] Under the 1991 Act, by virtue of s. 2 of the Employees Provident Fund (Amendment) Act 2000, s. 2 of the principal Act is amended in the definition of "wages":

(a) by inserting after the word "bonus" wherever it appears the words "commission"; and

(b) by deleting the word "or" at the end of para (d).

[14] Thus, after the amendment, the definition of "wages" under the 1991 Act reads:

"wages" means all remuneration in money, due to an employee under his contract of service or apprenticeship whether agreed to be paid monthly, weekly, daily or otherwise and includes any bonus, commission or allowance payable by the employer to the employee whether such bonus, commission or allowance is payable under his contract of service, apprenticeship or otherwise, but does not include:

(a) service charge;

(b) overtime payment;

(c) gratuity;

(d) retirement benefit;

(e) retrenchment, lay-off or termination benefits;

(f) any travelling allowance or the value of any travelling concession; or

(g) any other remuneration or payment as may be exempted by the Minister.

[15] The learned trial magistrate in her judgment also referred to the Privy Council case of *Peter Anthony Pereira & Anor. v. Hotel Jayapuri Bhd. & Anor.* [1987] 1 CLJ 14; [1987] CLJ (Rep) 12, a case concerning an interpretation of a word "wages" under s. 2 of Employees Provident Fund Act 1951. The issue in that case is whether 'service charge' is part of wages under the Act and whether the 1st appellant and the 1st respondent were obliged under the Act to pay monthly contributions to the 2nd respondent (the Employees Provident Fund Board), not only in respect of his basic salary and food allowances but also in respect of his share of the service charges collected from their customers by the 1st respondent. Vohrah J (as he then was), at first instance, held that upon the true construction of s. 2 of the act the 1st appellant and the 1st respondent are not liable in law to make monthly contributions to the 2nd respondent in respect of service charges paid to the 1st appellant by virtue of his employment with the 1st respondent. The appellants' appeal to the Federal Court was dismissed. The Privy Council held that:

> [1] Where a contract of service provides that the employee is bound to work for a certain period and provides for two distinct payments to which he shall be entitled as an employee, the proper conclusion to draw is that both payments are due to the employee in respect of the work which he has bound himself to perform.
>
> [2] Where, as in the 1st appellant's contract of service, there is a provision for additional remuneration if he does work over and above that which he has bound himself by his contract to perform, the additional amount he receives in consequence of an application of that provision will not be wages within the meaning of the act, but all remuneration to which he is entitled in terms of his contract if he performs only the work which he is bound to perform must, in the absence of special provisions, be properly regarded as remuneration in respect of the normal periods of work to be performed by him.
>
> [3] In the circumstances, the share of the service charge is properly to be regarded as due to the 1st appellant under his contract of service as remuneration and it is in respect of the normal periods of work, and that upon the true construction of s. 2 of the act, the 1st appellant and the 1st respondent are liable to make monthly contributions to the 2nd respondent in respect of service charges paid to the 1st appellant by virtue of his employment with the 1st respondent and that such monthly contributions be paid by the 1st appellant and the 1st respondent to the 2nd respondent from the date of this judgment.

[16] Thus, the question to be asked in this case is whether the commission of RM380 for each car sold by SP1 could be properly regarded as remuneration due to an employee under his contract of service:

(a) in respect of the normal periods of work to be performed by the employee;

(b) where payment is calculated in relation to a set task or tasks, in respect of the number of tasks completed by the employee; or

(c) where payment is calculated in relation to the volume of work done, in respect of the work completed by the employee.

[17] The learned DPP argued that the definition of wages under s. 2 of the 1951 Act includes a commission by virtue of limbs (b) and (c) of the said definition.

[18] Regarding a contract of service and a payment of the commission, SP1 in his evidence during the trial stated as follows:

> I'm working as sales executive. The duty is to sell car. Besides this there was no other job. As for the sale of the car, we usually went to the field to look for the customers. Our director, En. Hamid bin Ibrahim provides for the equipment in the office. His brother, En. Sharifudin bin Sani supervised me. He is manager of the Director's Brother. The instruction given that they normally ask us to go to the field to look for the customer to bring back target every month. Normally they will give us notice if we do not perform our job. I went for the interview and the company ask me to start work. En. Hamid bin Ibrahim (Director) ask me to start work. They didn't give any appointment letter. I fill up the application form and went for the interview. Telling me verbally that I engaged. They told me term and condition as normal. Salary RM250.00 per month and besides that, I received commission on car commission and car accessory, air conditioning and etc. in the company, the right to take the worker is En. Sharifudin bin Sani. Besides him, the director has the power to sack the workers. Working hour from 9.00 a.m. to 5.00 p.m. We work 5 day, include Saturday a half day.
>
> …
>
> The commission calculated depends on how many vehicle you sold for the month. One vehicle, RM380.00. on this commission they deduct on my EPF but they didn't contribute on my EPF. The commission comes from Ally Azran Holdings Sd. Bhd. The

A commission paid to us by cheque. Previously in 1989, the commission paid to the bank, straight away only after 1990 paid straight away to us. I started receiving the commission on February 1989 to December 31st 1990. I've the document to prove that I received the commission.

B **[19]** From the above sets of evidence, the court made the following findings of facts:

(i) A contract of service or employment between the company as an employer and SP1 as the employee came into existence when
C SP1 was verbally told by the director of the company after the interview that he was "engaged" and asked to start work.

(ii) The "term and condition" that SP1 testified as verbally told to him that includes the salary of RM250 per month and the
D commission of RM380 for each car sold would be constituted as terms and conditions in his contract of service with the company.

(iii) As the payment of commission to SP1 was only made to him based on the volume of cars that he managed to sell for each
E month, the court is of a view that the commission can be construed as 'payment calculated in relation to a set task or tasks' and it was only paid as a remuneration due under his contract of service 'in respect of the number of tasks completed by the employee'.

F **[20]** Based on the above facts, the court finds that the commission received by SP1 is a 'remuneration due to an employee under his contract of service where payment is calculated in relation to a set task or tasks, in respect of the number of tasks completed by the
G employee' as prescribed under limb (b) of the definition under s. 2 of the Act. Thus, it is a judgment of this court that 'the commission' is part of wages under the Act and the company/ respondent was obliged under the Act to pay monthly contributions to the Board, not only in respect of SP1's basic salary but also in
H respect of the commission received by him.

(ii) Whether The Respondent In This Appeal Was The Employer Of "SP1" Or Was It Another Company By The Name Of Ally Azwin Sdn. Bhd.

I **[21]** Regarding this issue, the learned trial magistrate in her judgment stated as follows:

SP1 juga mengemukakan dokumen P6 iaitu surat bertarikh 28/8/1991 yang ditandatangani oleh En. Donald Choo yang merupakan Pengarah Jualan EON Bhd pada masa itu memaklumkan kepada semua Penjual/Dealers hendaklah membayar caruman terhadap komisen kepada jurujual kereta, termasuklah syarikat Ally Azran Holdings Sdn. Bhd. Tetapi surat tersebut adalah selepas SP1 diambil bekerja dan tidak berkaitan dengan kesalahan yang dipertuduhkan terhadap OKS yang berlaku pada tahun 1990. Tetapi berlainan pula dengan keterangan En. Donald (SP4) sendiri iaitu di muka surat 42 nota keterangan mengatakan bahawa P6 ditujukan kepada syarikat Ally Azwin dan bukannya Ally Azwan *(sic)*. Nota keterangan dirujuk seperti dibawah:

S: I suggested that the dealership of EON given to Ally Azwin from 02/01/1989 to 28/02/1991?

J: Agreed, based on the D3 and D4.

S: Based on P6 (all dealers) referring to Ally Azwin or Ally Azran?

J: Based on the date, yes for Ally Azwin.

S: Is it possible at the same time Ally Azran and Ally Azwin hold as dealers?

J: It is not possible.

Jadi persoalannya disini ialah siapakah yang sebenarnya bertanggungan untuk membayar caruman OKS pada bulan Januari dan Februari tahun 1990 seperti dalam pertuduhan tersebut? ...

Keraguan yang sebegini telah diperkuatkan lagi oleh keterangan SP2 iaitu En. Jainal yang merupakan pegawai penyiasat kes ini semasa di soal balas oleh peguam OKS di muka surat 24 nota keterangan yang bersetuju dengan peguam bahawa syarikat OKS hanya mengambil pekerja pada 1/6/1991 dengan merujuk kepada P11 iaitu Penyata Seorang Majikan, iaitu seramai 12 orang pekerja dan tiada senarai nama pekerja dikemukakan. SP1 bekerja dengan syarikat yang disaman sebelum tarikh pendaftaran syarikat tersebut dengan KWSP iaitu pada 1/1/1989. Jadi, keraguan sekali lagi timbul samada SP1 benar-benar bekerja dengan syarikat OKS dan OKS bertanggungjawab membayar caruman tersebut.

[22] The learned DPP in his submission argued that Ally Azwin has nothing to do with this case. He pointed out that D4 was a letter addressed to Ally Azran Holding Sdn. Bhd and D5 was an agreement between EON and Ally Azwin and argued that there was a misunderstanding on the part of the learned trial magistrate in deciding that an employer in this case could not be sufficiently determined between Ally Azran and Ally Azwin.

[23] To recap, exh. D3 was a letter dated 1 December 1988 from EON to the respondent company which "intention" according to SP4 was "to appoint Ally Azran as EON vehicle sales dealers. Commencement on 2 January 1989". It was clear that D4 was addressed to Ally Azran Holding Sdn. Bhd ie, the respondent. Apparently, SP4 had mistaken it as addressed to Ally Azwin because when it was suggested to him by the counsel that the dealership of EON was given to Ally Azwin from 2 January 1989 to 28 February 1991, he answered "Agreed, based on the D3 and D4". Thus it was clear that as far as the dealership of the Proton Saga car which commence on 2 January 1989 is concerned, exh. D3 shows that it was given to the respondent, not Ally Azwin as stated by SP4.

[24] Be as it may, the court is satisfied that based on the evidence as a whole, there is no doubt whatsoever that the respondent in this case was the employer of SP1 as far as the EPF contribution for the months of February and March 1990 are concerned, not Ally Azwin. Thus, for the learned trial magistrate to hold otherwise is clearly against the weight of the evidence.

[25] However, from the evidence, there is another aspect of this case that the court thinks had been overlooked by the learned trial magistrate in her judgment which is critical in determining the present appeal and the court had adjourned the case to allow time for both parties to further submit on the issue. That issue is whether it was EON who had actually caused the respondent in this case to default in its payment of the contribution to the Board.

[26] On the appointed date, the learned DPP then informed the court that the contribution was deducted by EON and was then returned to a dealer for the dealer to cause the contribution to be paid to the Board. However he conceded that there was no voucher produced during the trial to support this assertion.

[27] The court will now make a finding based on the evidences before the court. Exhibit P3 was, according to SP1, a pay or salary slip for the month of January 1990. As to why the words "Payroll EON department for the month of January 1990" appeared on the slip, SP1 said "The payroll EON department means because we are in EON section of Ally Azran Holdings Sdn. Bhd." Further, besides the name of SP1, the slip also contains the name of seven others. From exh. P3, it appears that a deduction of the employee's and employer's contributions amounting to RM44 and RM36 respectively were only made in respect of the employee named

Rohayati binti Mat Nasir, while for the others named in the slip, no such deduction were made. When asked in the cross-examination as to why it is so, SP1 answered "Because she is the typist". He denied a suggestion that it was because only Rohayati was a full time staff while the others were merely "freelance".

[28] The court further referred to the following evidence that transpired in a cross-examination of SP1:

Q: Referring to P4 and P5, the commission that I received for the sales of car. Who issued?

A: EON issued the statement.

Q: Who made the deduction?

A: EON made the deduction to EPF.

...

Q: Why EON deduct the EPF not Ally Azran?

A: Because Ally Azran having agreement with the dealers. I've the document from the dealers. It is the country law to pay for the EPF.

Q: Is this letter (exh. P6) was addressed to Ally Azran?

A: Letter dated 1991, 23 August. P5 and P6 was dated in 1990 sales.

Q: From P4 and P5, from the record, who was holding EPF money?

A: Ally Azran Holdings Sdn. Bhd. I don't have the record/ evidence to show the evidence that Ally Azran was hold the EPF money.

[29] Exhibits P4 (a-m) and exhs. P5 (a-p) (at p. 107-121 and 147-162 of the record of appeal) were documents issued by EON that shows the amount of commission received by SP1 from February 1989 until December 1990. The documents show that the employee's EPF contributions were deducted from the total amount of commission received by the employee for each month. Regarding exh. P4 and P5, SP4 gave the following evidence:

Examination-in-chief.

As for the document concern it is Ally Azran, but if the company change its name, we still maintain the code. The commission payable to Ally Azran.

Cross-examination:

Merujuk kepada P4 dan P5 there are the summary of sales commission issued by different people in our office. Dealers operation issued this but I'm aware of these documents.

Re-examination:

P4 dan P5 is concerned, EON pays commission to Ally Azran based on these documents.

[30] The court now turns its attention to exh. P6. It is the court's view that the existence of this letter gives more credence to the possibility that prior to the issuance of the letter, contrary to the evidence of SP4, it was EON and not a dealer which is responsible for the payment of the contribution to the Board.

[31] In light of the evidence of SP4 as above and further based on close scrutiny of exh. P4 and P5, it appears to the court that the amount of commission to be received by a sales representative such as SP1 was first determined by EON and the payment was then made by EON to the dealers after deducting the EPF contribution and then for the dealers to pay the commission to the sales representative. Thus, in such a situation, the burden is on the prosecution to prove during its case that, if indeed it was the dealer who is liable to pay for the contribution to the Board under the agreement between EON and the dealers as stated by SP4 and indeed as shown by exh. P6, such deduction had been remitted back by EON to the dealer and indeed had reached the dealer before it could be assumed that the dealer is then responsible to make sure that the contribution reached the Board. In the event of its failure to do so, there would be a serious gap in its case, which in the court's view, such was the case. Thus, it was in this aspect of the case that the court found that the evidence is lacking to the extent that the evidence as it is had failed, under the maximum evaluation test, to prove a *prima facie* case against the respondent in this case.

[32] Based on the premise above, the court thereby dismissed the appeal and confirmed the order of acquittal made by the learned trial magistrate.